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### Liberties and the information society

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## Liberties and the Information Society: the Right to Participate in the Information Society and the Right not to

Our intention is to underline how the development of the information society should lead to affirming the existence of two new rights: the right to participate in the information society; the right not to. These two rights should be considered as complementary, they appear as the very preconditions for the survival of our liberties within an information society that wishes to consider itself democratic. The content of these two rights can be inscribed under different headings as we will show below.

### 1. The right to participate in the information society

It is frequently stated that the development of information and communications technologies contributes to democracy, notably by allowing us to more actively take part in society, inasmuch as technology offers everyone a means of public expression and favours the activities of associations whose objective it is to take an active part in the public debate.

However, the myth of the global village invoked by the partisans of the above affirmation risks to remain just a myth if certain precautionary measures are not taken. If we are to avoid a two track society, the right of every citizen to take part in the information society implies that each and everyone has to have access, at a reasonable price, to the technical means necessary to be present in cyberspace, as well as access to certain digital information. To this first right a second is added. The citizen who is admitted to exercise his freedom of speech within the information society, must be able to master that which arises from the cyber-image he/she creates by exercising that freedom. This right to control the use of this electronic identity constitutes the second part of our deliberations.

### 1.1 Right of access, or how to redefine the universal service within the information society

The idea of an evolutive, universal access service to communication technology was first preached in the USA, then in Europe. If universal service is designed according to official directives and documents, whether European or American, as a service which gives qualitative accessibility to all at a reasonable price, its range should be progressively enlarged according to the evolution of demand. Though today limited solely to voice transport and access to an infrastructure of limited capacity, the concept could tomorrow include the availability of E-mail, navigator programmes and access to an electronic signature, all at an easily affordable rate. Maybe the laws of the market as put forward by Pareto's optimum, will render any state intervention in this matter useless. If however the development of these media by governments and the private sector were to expand to such an extent that not being connected could risk depriving the citizen of a number of vital advantages, such an intervention would become justified tomorrow.

The right of access we are concerned with here cannot be seen as purely individual. As we see it, the demands of democratic debate require that numerous associations of a philanthropic, cultural, religious or philosophic nature should be able to use these technologies in order to promote their ideas and contribute to the level of public debate. The idea of making training in the use of modern communication technologies available to associations for the design and maintenance of their sites, even of financial support for such projects, was recently raised. We know the precedent set by 'Community TV', managed by associations whose goals are similar to those cited above. Some of these associations have been specially trained in the making of material for TV within a state-subsidised scheme that makes the transmission of their programmes obligatory.

The access to technology will only become reality if, in parallel, the right of everyone to receive adequate training in the use of new media is recognised. The struggle against technological illiteracy, recently described by the French as 'illelectronism' appears to be a second aspect of the universal service. Recent measures taken by the Belgian government as well as at the regional level to connect educational establishments to the Internet and to set up a mixed fund to this end, half public — half private, aiming to provide schools with the necessary equipment and programs for students to realise this wish. We should add that this right to education, or rather to modern means of education, justifies the appeal for a complete exception to the prerogatives of copyright and associated rights for the purposes of research and education.

If individual and collective rights of access, both to technology and to education will prove to be indispensable prerequisites for a citizen's participation

in the information society, access to certain informational content would appear to be even more fundamental if such participation is to be assured. In this context it has been noted that the requirements of functional transparency imposed on governments, in particular by laws concerning access to administrative documents, have not been conceived in a purely passive sense, which is to say that the state is obliged to respond to the needs of the citizen. They are seen in an active sense, as the state's obligation, after consideration of the imperatives of privacy, state security and public safety, to make the information it holds available to its citizens, and this by electronic means whenever feasible. This affirmation, intended as a recognition of a genuine universal public information service, is already law in several countries. Thus Australia and the United States have already adopted the 'Electronic Freedom of Information Acts' obliging administrations to make any general interest information they possess available on the Internet free of charge.

The duty of the state does not, however, end there; the rule of proportionality has been invoked to affirm that the state must also make the same information processing tools available to its citizens which it uses itself to process data. Thus a citizen could acquire a program, used by the administration for the calculation of tax or social assistance grants, at a reasonable price. A recent law on administrative simplification preaches the same gospel, calling for the creation of universal access turnstiles for small and medium-sized businesses, to enable them to simplify their relationships with the authorities and to grant them access to public sector data. This idea could be extended to individual citizens who would then be able, via a single electronic turnstile, to contact their administrative authorities, talk their case through with them and fill in the required electronic forms. The right to electronic procedures would thereby be recognised.

The universal service concept, when applied to informational content, does not only target the state. First American jurisprudence, but more recently the Flemish Legislature, have invoked the duty of cable system operators not to restrict public access to certain information and current events judged to be in the general interest. The case in question concerned television transmissions of sports and other current events which diffusion could not be encrypted. Is not the obligation of the private sector to make information that serves the general interest available to the public already present in law, such as in environmental legislation requiring the publication of pollution or radioactivity levels?

Recently, American doctrine focussed on the possible emergence of a new role for the state with regard to a society where the source of journalistic information is increasingly private and risks being guided by partisan bias or economic interest. The idea, and it is an astonishing one to have surfaced in the land of unbridled liberalism, was to make the state responsible for creating a body to guarantee that information is neutral and free from all pressure. In

our own case this consideration justifies maintaining a universal (or public) journalistic information service capable of serving as a point of reference for the entire population.

## 1.2. The right to 'control' one's own computer image in the information society

The internaut leaves multiple traces in many places in cyberspace each time he or she enters it, whether through the use of search engines, such as Altavista, when surfing from site to site, when taking part in one or other of the available discussion forums, buying the latest best-seller on Amazon, making a flight reservation at a favourite travel agent, or when sending a message to a friend, a member of parliament or the family doctor.

It must be made clear that the internaut may be involved in processes other than those he or she has legitimately chosen, invisible processes such as 'cookies', programmes like Java Script which have been activated by servers in response to questions about the user's net navigator, invisible hyperlinks inserted by various parties, such as cybermarketing services, into the websites he or she consults in order to build up a user profile of each surfer's choices.

To these risks can be added others which are linked to the very nature of the Internet. The global character of the net, being ignorant of all borders, allows data processing activities to take place in localities which offer no protection. The 'open' character of the network not only makes it vulnerable and multiplies the risk of data confidentiality being breached but may, above all, prevent any control of the finalities to which data are used. The information I make accessible via the web, my response to a particular statement made within the forum of a discussion group, for example, may be tracked down by search engines — and Deja News has made a speciality of this — and used in an entirely different context to an entirely different end.

The risk of increasing opacity in data processing and the risks of uncontrolled proliferation must be countered by an enhanced and increased affirmation of the right of the person concerned to their transparency. Given the limitless and borderless nature of cyberspace, it is all the more essential that the right of each and everyone to know who is putting them on file, how, why and exactly for whom, be recognised therein, just as it already is in the traditional world.

Here the principle of proportionality, as treated above, finds new applications with regard to relations between governments and the governed. An automatic harvesting of data by those responsible for its processing must be matched by their obligation to ensure transparency by electronic means. Thus the right to access one's own data, to insist on its suppression or correction or

to oppose its transmission to a third party must be automatically possible by means of a single on-line consultation.

Doubtless such a demand will not elicit a satisfactory response unless and until it leads to concrete measures aimed at ensuring respect of our national law outside these frontiers in countries where agencies collecting or processing data are sited but where such rights are either non-existent or flouted. To this end the necessity for instruments of law emerges, effectively enshrining the above-mentioned rights and ensuring their respect, to be established in every part of the globe.

This is the sole condition capable of assuring citizens against the risk of expressing themselves personally on the net. Numerous studies, notably in the United States, demonstrate that the lack of adequate data protection is felt by citizens to be obstacle number one to their actual use of information super-highways. It is clear that insuring adequate data protection is the evident guarantee of individual free expression. It is therefore impossible to affirm the one without the other.

## 2. The right to exclude oneself from the information society, or towards a new right, that of 'opacity'

The first section sought to clarify those legal instruments capable of assuring a citizen's participation in cyberspace, the second introduces a flat note to the harmony of participation thus encouraged. This is the issue of recognising the right not to participate, that is to say, the right not to appear as a participant on the information super-highway (right to anonymity), even to refuse the use of technologies of information or communication. Beyond this we raise questions on the limits to be imposed upon the use of technologies; whether we should not be reaffirming the individual's right to privacy, not in the sense already mentioned, that of control of one's cyber-image, a control which ensures a better dialogue between the citizen and the authority or company administering his or her data, but rather in the primary sense of the term 'privacy': the right to be 'left in peace', that which we have chosen to call the right to opacity.

### 2.1 The right to anonymity

Not long ago, on 3 December 1997, a working group calling itself the 'Article 29 Group', created by the data protection directive, concluded as follows: 'The ability to choose to remain anonymous is essential if individuals want to preserve the same protection for their privacy on-line as they currently enjoy off-

line...'. The right to anonymity, the recommendation makes clear, is based as much on the right to privacy as it is on the right to freedom of expression and demands that the legal restrictions justified by important issues of public interest should be strictly proportional to the necessity for the maintenance of such interests within a democratic society. This right to anonymity is expressed by the right to make use of anonymous methods of payment and encryption technology. It extends to the right not to reveal one's own telephone number in an advanced telephone network and to the right to use means of anonymous access (public Internet terminals or a de-personalising server).

## 2.2. The right not to make use of new information and communication technologies

This second aspect of the right of citizens to exclude themselves from the information society may firstly be considered as founded upon social and psychological conditions: thus, how can we expect an elderly person, suspicious of technological progress, to use a communication system that he does not understand? There is, however, a more essential significance. The freedom of each and every one of us is expressed in our choice of communication method. There can be no question, under whatever pretext of efficiency or administrative or budgetary consideration, of imposing on those seeking to obtain access to a service or see to some formality, the exclusive use of an electronic system. The duty of authorities to maintain, alongside electronic procedures, traditional paper methods, without in any way penalising those who ask to use them, seems to me in need of affirmation. Thus a person's right not to use an electronic signature is justified.

## 2.3 The right to be left in peace, or the right to opacity

A recent resolution of the International Office of Work called for workers to have access, on the one hand, to spaces not covered by video surveillance, and on the other, to communication media (telephone, e-mail) through which the absolute confidentiality of messages, vis-à-vis their employer, could be assured. The resolution was justified by the steep increase in technologically assisted surveillance of behaviour of the workers.

In an entirely different field, data protection and consumer protection directives have enshrined a new right: that of opposing, simply upon demand and free of charge, any electronic processing of one's data to commercial ends. The right not to appear in telephone directories enshrined in the 'telecommunication and privacy' directive is derived from the same principle.

That this amounts to the first burgeoning of the right to be left in peace is indisputable. However, this right to opacity looms larger and more fundamental than that. Some countries have forbidden the processing of data relative to a viewer's programme choice by cable television operators, and the use of data relating to the hiring and purchasing of videocassettes is equally subject to regulations.

The low cost of data processing, the almost infinite transmission and processing capacity, explain the temptation for private or public operators to use information technologies to increase the efficiency of their systems, enable easier control and combat abuse. Thus we already find ourselves, and shall increasingly in the future, taking part in the setting up of vast computerised systems, inaugurated, either within the social security system, to ensure optimum administrative and financial management of the health-care sector, or in other sectors, to enable fiscal control or control of the black market in employment. In urban areas, there is the temptation to multiply the number of automatic monitoring systems to resolve the difficulties of peak-hour traffic control or to combat car theft. Illegal traffic in telecommunications, including Internet crime, will become the processing target of various operators in the name of public necessity: this will be a matter of providing the police with the appropriate arms to combat cyber-crime, child pornography and other excesses to which the Internet has become a home.

Faced with the infinite possibilities for the use of information and communication technologies, the duty exists to abstain from the proliferation of processes and connections, so that citizens may freely exercise their right to self-determination within the secret garden of their own private space.

## Conclusions

The information society demands the recognition of new rights of which the first signs already emerge through certain texts, though sparse or of limited range. There is a programmatic interest in recognising such new rights. They enable us to put their first appearances into perspective and to plead for their enlargement and enhancement in proportion to the rate at which their context evolves. The affirmation of these new rights clearly points towards two values considered to be essential in our society, but which risk hypertrophy in the current climate of new technologies: rights of property (including intellectual copyright) and the public interest.

Thus technology (for example Electronic Rights Management Systems) risks granting to copyright, the existence and principles of which are incontestable, a dimension and effectiveness that is without precedent. It must be clear, and we should be reminded, of the fact that these technologies and rights may not prej-

udice our common right of access to knowledge and that, where necessary, the right to knowledge limits the prerogatives of bearers of such rights.

Thus public interest, which represents the access to knowledge, legitimates the limits of such prerogatives. On the other hand, the same public interest, inas-much as technologies tend to grant it increasing and sometimes disproportionate effectiveness, must itself be determined by the citizen's right to free space.

So, we find ourselves called upon to reflect profoundly on the equilibrium between the rights of citizens and those rights the power of which, whether in public or private domain, is unquestionably reinforced by technology. This debate is a fundamental one if we are to survive in the face of such powerful agents, not just as isolated individuals, but as citizens who are fully responsible for our social choices.